UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/762,916	01/22/2004	Daniel Manuel Dias	SVL920030091US1/4181P	6138

45728 7590 06/19/2008 SAWYER LAW GROUP LLP P.O. BOX 51418 PALO ALTO, CA 94303	**EXAMINER** PARK, JEONG S

ART UNIT	PAPER NUMBER
2154	

NOTIFICATION DATE	DELIVERY MODE
06/19/2008	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE <u>3</u> MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.
- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *3/27/2008*.

2a)☒ This action is **FINAL**.   2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *34-49* is/are pending in the application.

    4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *34-49* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☒ The drawing(s) filed on <u>22 January 2004</u> is/are: a)☒ accepted or b)☐ objected to by the Examiner.

    Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

    Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

    a)☐ All   b)☐ Some * c)☐ None of:

        1.☐ Certified copies of the priority documents have been received.

        2.☐ Certified copies of the priority documents have been received in Application No. _____.

        3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

    * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) ☒ Information Disclosure Statement(s) (PTO/SB/08)
    Paper No(s)/Mail Date *3/27/2008*.

4) ☐ Interview Summary (PTO-413)
    Paper No(s)/Mail Date. _____ .

5) ☐ Notice of Informal Patent Application

6) ☐ Other: _____ .

DETAILED ACTION

1.   This action is in response to communications filed March 27, 2008.

Response to Arguments

2.   Applicant's arguments with respect to claims 34-49 have been considered but are

moot in view of the new ground(s) of rejection.

Claim Rejections - 35 USC § 103

3.   The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all

obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set
> forth in section 102 of this title, if the differences between the subject matter sought to be patented and
> the prior art are such that the subject matter as a whole would have been obvious at the time the
> invention was made to a person having ordinary skill in the art to which said subject matter pertains.
> Patentability shall not be negatived by the manner in which the invention was made.

4.   Claims 34-49 are rejected under 35 U.S.C. 103(a) as being unpatentable over

Herington (U.S. Pub. No. 2005/0102387 A1) in view of Sankaranarayan et al.

(hereinafter Sankaranarayan)(U.S. Patent No. 6,799,208 B1).

Regarding claim 34, Herington teaches as follows:

a method for supporting a transaction application (interpreted as one application

255 in figure 2) workload and a parallel application (interpreted as the other application

260 in figure 2) workload on one server cluster (220 and 233 in figure 2)(see, e.g., page

1, paragraph [0014], the method comprising:

receiving a request from a client (clients 202-206 in figure 2) to execute the

transaction application workload on the one server cluster (cluster 220 or 230 in figure

2)(clients issue transactions to application via a network to communicate with clusters,

see, e.g., page 1, paragraph [0015]), the one server cluster including server nodes

(nodes 240-250 in figure 2) at one domain (the clusters each comprise a plurality of

nodes, see, e.g., page 1, paragraph [0014]);

identifying a service level agreement negotiated with the client for the transaction

application workload, the service level agreement (performance goals, see, e.g., page

2, paragraph [0022]) specifying performance requirements for execution of the

transaction application workload on the one server cluster (the incorporated Romero et

al. (hereinafter Romero)(U.S. Pub. No. 2002/0069279 A1) teaches an apparatus and

method for routing a transaction to a server based on a requested level of service

associated with the transaction, see, e.g., abstract);

assigning a subset of the server nodes in the one server cluster at the one

domain to execute the transaction application workload (load balancer monitors service

levels provided by each node of cluster and routes transactions to one of the nodes

based on the level of service that the node is providing, see, e.g., page 2, paragraph

[0019]);

monitoring execution of the transaction application workload (performance

information) on the subset of server nodes assigned to execute the transaction

application workload to determine whether the performance requirements for execution

of the transaction application workload specified in the service level agreement are

being met (workload manger receives performance information from applications, see,

e.g., page 2, paragraph [0023]);

responsive to a determination that the performance requirements for execution of

the transaction application workload specified in the service level agreement are not

being met, dynamically reassigning one or more of the server nodes in the one server

cluster at the one domain assigned to execute the parallel application workload to the

execution of the transaction application workload in order to meet the performance

requirements for execution of the transaction application workload specified in the

service level agreement (workload manager dynamically allocate and adjust computer

resources between applications based on performance goals and performance

information, see, e.g., page 2, paragraph [0024]); and

wherein a server node (node 240 in figure 2) assigned to execute the transaction

application workload (application 255 in figure 2) cannot be concurrently assigned to

execute the parallel application workload (application 260 in figure 2) and a server node

(node 250 in figure 2) assigned to execute the parallel application workload cannot be

concurrently assigned to execute the transaction application workload (two node 240

and 250 are respectively dedicated to two different applications, see, e.g., page 1,

paragraph [0014]).

The incorporated McCarthy et al. (hereinafter MaCarthy)(U.S. Patent No.

7,228,546 B1) further teaches that the workload manager allocates application's

partition bases on the goal information and priority information from a user or

administrator and performance information (see, e.g., col. 2, lines 27-40). Therefore it is

inherent to assign 100% of resource for one application.

Herington does not teach reassigning the node but reassigning computer

resources.

Sankaranarayan teaches as follows:

resource manager (102 in figure 2) assigns resources to all descriptors contained in the listed activities using a provider supplied resource allocation function in a priority based scheme, see, e.g., col. 11, lines 45-62 and figure 3);

resource allocation process using priority-based preemption (see, e.g., col. 14, lines 55-59 and figure 6); and

reallocating the resource from lower priority activity to the higher priority activity (see, e.g., col. 15, lines 8-48 and figure 6).

It would have been obvious for one of ordinary skill in the art at the time of the invention to modify Herington to include a resource manager allocating a resource provider depends current request from clients as taught by Sankaranarayan in order to efficiently allocate the intersecting nodes (242-248 in figure 2) to one of applications (255 or 260) based on the current request from clients.

Regarding claim 35, Herington in view of Sankaranarayan presented above per claim 34 for all the limitations on claim except for predicting performance requirements in the service level agreement.

The incorporated Romero teaches that the server index can be based on known capabilities and predicted service levels of the servers in the server pool based on past performance, see, e.g., page 4, paragraph [0033]).

Regarding claims 36-38, Herington in view of Sankaranarayan teach all the limitations of claim as presented above per claim 34.

It would have been obvious for one of ordinary skill in the art at the time of the invention the nodes (240-250 in figure 2 taught in Herington) include an uninitialized

(one of any intersecting nodes 242-248 is installed for the application 255 but has not

been used for the application execution), uninstalled (the node 250 is not installed with

the application 255) or unassigned node (any node newly included in either clusters).

Regarding claims 39 and 40, the plurality of nodes are server computers (see,

e.g., page 1, paragraph [0014]) are capable of running any applications including stock

trades and optimization of a stock portfolio.

Regarding claim 41, Herington teaches as follows:

wherein the service level agreement (interpreted as performance goals)

negotiated with the client for the transaction application workload is also applicable to

the parallel application workload (performance goals for both of two applications, see,

e.g., page 2, paragraph [0022]).

Regarding claim 42, Romero teaches as follows:

wherein the performance requirements for execution of the transaction

application workload specified in the service level agreement comprises throughput

requirements (the requested level of service can be a specific parameter such

processing capacity, see, e.g., page 2, paragraph [0023]).

Regarding claim 43, Herington teaches as follows:

wherein the performance requirements for execution of the transaction

application workload specified in the service level agreement comprises response time

requirements (performance goals include response time, see, e.g., page 2, paragraph

[0022]).

Regarding claim 44, Romero teaches as follows:

wherein the performance requirements for execution of the transaction

application workload specified in the service level agreement comprises availability

requirements (status of a particular server such as availability, see, e.g., page 3,

paragraph [0027]).

Regarding claims 45 and 46, it is well known in the art at the time of the invention

to include the downtime requirement and penalty function in the SLA.

Regarding claim 47, Herington teaches as follows:

monitoring one or more of a transaction rate, a transaction response time,

availability of a server node, and utilization of a server node (workload manger receives

performance information from applications, see, e.g., page 2, paragraph [0023]).

Regarding claim 48, Herington teaches as follows:

wherein reassignment of the one or more server nodes assigned to execute the

parallel application workload to the execution of the transaction application workload is

based on prioritization of the service level agreement negotiated for the transaction

application workload (relative priority of importance associated, see, e.g., page 2,

paragraph [0022]).

The incorporated McCarthy further teaches that the workload manager allocates

application's partition bases on the goal information and priority information from a user

or administrator and performance information (see, e.g., col. 2, lines 27-40).

Regarding claim 49, it is obvious to negotiate the priority based on the penalty

listed in the SLA.

Double Patenting

5.   A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

6.   Claims 34 and 35 are provisionally rejected under 35 U.S.C. 101 as claiming the

same invention as that of claims 34 and 35 of copending Application No. 10/763,135.

The claims of Application 135' teaches a method for supporting application

workloads across multiple domain and the application 916' teaches a method for

supporting a transaction and a parallel application workloads on one server cluster.

It would have been obvious for one of ordinary skill in the art at the time of the

invention to modify the multiple domains into one server cluster and specifying the

application workloads with the transaction and the parallel application workloads.

"A later patent claim is not patentably distinct from an earlier patent claim if the

later claim is obvious over, or **anticipated by**, the earlier claim. In re Longi, 759 F.2d at

896, 225 USPQ at 651 (affirming a holding of obviousness-type double patenting

because the claims at issue were obvious over claims in four prior art patents); In re

Berg, 140 F.3d at 1437, 46 USPQ2d at 1233 (Fed. Cir. 1998) (affirming a holding of

obviousness-type double patenting where a patent application claim to a genus is

anticipated by a patent claim to a species within that genus)." ELI LILLY AND

COMPANY v BARR LABORATORIES, INC., United States Court of Appeals for the

Federal Court, ON PETITION FOR REHEARING EN BANC (DECIDED: May 30, 2001).

This is a provisional double patenting rejection since the conflicting claims have

not in fact been patented.

Conclusion

7.   Applicant's amendment necessitated the new ground(s) of rejection presented in

this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37

CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE

MONTHS from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not

mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later

than SIX MONTHS from the date of this final action.

8.   Any inquiry concerning this communication or earlier communications from the

examiner should be directed to JEONG S. PARK whose telephone number is (571)270-

1597. The examiner can normally be reached on Monday through Friday 7:00 - 3:30

EST.

        If attempts to reach the examiner by telephone are unsuccessful, the examiner's

supervisor, Nathan Flynn can be reached on 571-272-1915. The fax phone number for

the organization where this application or proceeding is assigned is 571-273-8300.

        Information regarding the status of an application may be obtained from the

Patent Application Information Retrieval (PAIR) system. Status information for

published applications may be obtained from either Private PAIR or Public PAIR.

Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see http://pair-direct.uspto.gov. Should

you have questions on access to the Private PAIR system, contact the Electronic

Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a

USPTO Customer Service Representative or access to the automated information

system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/J. S. P./
Examiner, Art Unit 2154

June 13, 2008

/Joseph E. Avellino/
Primary Examiner, Art Unit 2146